

**Examples of Information to Show Tribal Authority over Nonmember Activities  
Under *Montana v. United States*: Impacts of Nonmember Activities on Tribal  
Political Integrity, Economic Security, or Health or Welfare<sup>1</sup>**

The information below briefly summarizes the jurisdictional showing a tribe must generally make to establish eligibility for treatment in the same manner as a state (TAS) approval for the water quality standards (WQS) and certification programs and provides examples of the types of information federally recognized Indian tribes (tribe or tribal) have found useful in making that showing. Please note, the showing any specific tribe must make will be case-specific, based on facts applicable to the tribe's reservation. Thus, a tribe using these examples should carefully consider how each example applies to the tribe's reservation – some examples may be helpful and appropriate, but others may have only limited application, or may not apply at all. Finally, a tribe may find that the facts concerning its reservation make it appropriate to provide information not contained in these examples.

### **Introduction**

The Clean Water Act (CWA) Section 518(e) (2) authorizes the U.S. Environmental Protection Agency to treat a tribe as a state for functions that pertain to management and protection of water resources “within the borders of an Indian reservation.” EPA has interpreted this provision to require that a tribe show authority over the water resources for which it seeks TAS approval, including any authority the tribe asserts over nonmember activities on the reservation. 56 Fed. Reg. 64876, 64880 (Dec. 12, 1991). EPA analyzes a tribe's inherent authority over nonmember activities under the test established in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana* test). *Montana* held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee land, but retain inherent civil jurisdiction over nonmember activities within the reservation where (i) nonmembers enter into “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or (ii) “... [nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566.

In the preamble to EPA's 1991 water quality standards regulation, the Agency noted that, in applying the second prong of the *Montana* test and assessing the impacts of nonmember activities on a tribe, EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Fed. Reg. at 64878-79. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation necessarily depends on the specific circumstances presented by the tribe's application. *Id.* at 64878. Thus, EPA's approach to the second prong of the *Montana* test involves a fact-specific inquiry to determine whether the tribe has shown that existing and potential nonmember activities

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<sup>1</sup> EPA first announced this test in the Water Quality Standards preamble, but generally uses the test whenever it needs to determine a tribe's inherent authority over nonmember activities.

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within the reservation affecting water quality have or may have serious and substantial direct impacts on the political integrity, economic security, or health or welfare of the tribe.

### **Examples of General Information to Support a Claim of Inherent Authority to Protect Water Quality<sup>2</sup>**

To support a claim of inherent authority to protect water quality, a tribal application documents the importance of protecting reservation waters to the tribe. General information that may help in showing this importance could describe how the following relate to water quality protection for these waters:

- The tribe:
  - tribal culture
  - tribal political and social organization
  - tribal lifestyles, folkways, and values
  - tribal religion
- The reservation:
  - economic activity currently taking place
  - economic activity that the reservation's characteristics could support, such as information about:
    - natural resources
    - climate
    - soil conditions
    - topography

The following types of land use information could be relevant to this inquiry:

- A copy of the Bureau of Indian Affairs map of the area over which the Indian tribe asserts authority for purposes of the TAS application under Section 518 of the CWA
- Land ownership information (maps and summary information on tribal trust, Indian trust, Indian fee, nonmember fee and other lands)
- Zoning maps and information about the tribe's zoning requirements
- Sewer districts or irrigation districts (maps and summary information)
- Water Resources and hydrogeology of the reservation:
  - Watersheds (maps and summary information about how water flows from lands into downstream water bodies)
  - Water bodies on and around the reservation (location, description, water quality issues, uses, environmental sensitivity)
  - Wetlands and sensitive areas
  - Groundwater and surface water, including hydrogeologic connectivity, and how pollution in one surface water body can migrate to other water bodies, or to ground water that may be used as a drinking water source

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<sup>2</sup> The discussion below and the examples of information provided in tribal applications generally focus on the second prong of the *Montana* test relating to impacts of nonmember activities. Tribes should, however, also consider providing information regarding consensual relationships with nonmembers that may be relevant to a demonstration of authority under the first prong of the test.

In addition to the above, EPA's analysis may focus on the following specific types of information:

### **Examples of Information About Uses of Water to be Protected**

Tribal applications have identified various ways tribes use or depend on reservation waters:

- Cultural, ceremonial, etc.
- Domestic drinking water supply
- Fisheries management
- Fishing, gathering plants, and other in-water activities
- Fish and wildlife watering habitat
- Ranching/grazing (stock watering)
- Recreation
- Water rights
- Agriculture (source of irrigation water)

### **Examples of Nonmember Activities Identified in Tribal Applications**

EPA analyzes nonmember activities that actually occur on the reservation or that could occur, consistent with the reservation's characteristics, and the environmental consequences of those activities, including the following:

- Agriculture:
  - Uses of pesticides or fertilizers
  - Diversion of water for irrigation
- Businesses, Schools, Places of Worship:
  - Wastewater facilities or septic systems
  - Underground storage tanks
  - Industrial operations
  - Automotive repair chemicals
- Construction:
  - Stormwater runoff
  - Erosion and sedimentation
  - Increase in amount of impervious surfaces
  - Use of road chemicals
  - Operation of vehicles and machinery
- Energy Development and Transport (e.g. pipelines):
  - Oil and gas operations
  - Coal or other mining operations
- Ranching/Grazing:
  - Streambank erosion
  - Concentrated animal feeding operations
  - Animal access to surface water
- Residences:
  - Wastewater facilities or septic systems
  - Use of lawn chemicals
  - Improper disposal of household hazardous chemicals

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- Forestry and Timber harvesting:
  - Erosion
  - Reduction in extent or quality of stream buffers
- Recreation:
  - Boating
  - Fueling facilities
  - Waste facilities or septic systems
  - Marinas and docks
  - Increase in aquatic invasive species

### **Examples of How Pollutants May Affect a Tribe**

Applications have also discussed how pollutants actually or potentially released by nonmember activities could affect the tribe, its members, or its resources. Those discussions have included the following types of information:

- Impact of pollution on natural resources available to tribal members – shellfish, fin fish, plants (e.g. wild rice)
- Impact of pollution on natural resources affecting the income of the tribe and tribal members
- Impact of pollution on drinking water sources:
  - Human health
  - Costs of meeting treatment requirements
  - Costs and difficulties caused by need to obtain water supplies from other sources